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Nos. 92-155 and 92-219

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

STATEWIDE REAPPORTIONMENT ADVISORY COMMITTEE, *et al.*,

Appellants,

v.

NICK THEODORE, *et al.*,

Appellees.

CARROLL A. CAMPBELL, JR., GOVERNOR OF SOUTH CAROLINA,

Appellant,

v.

NICK THEODORE, *et al.*,

Appellees.

On Appeal from the United States District Court for the District of South Carolina

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MOTION TO DISMISS OR AFFIRM

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QUESTIONS PRESENTED

(1) Did the court below properly determine that the plan it drew for the South Carolina Senate did not have a discriminatory effect under Section 5 of the Voting Rights Act by applying the retrogression test announced by this Court in *Beer* v. *United States*, 425 U.S. 130 (1976), and *City of Lockhart* v. *United States*, 460 U.S. 125 (1983)?

(2) Did the court below, in fashioning its redistricting plan for the South Carolina Senate, give adequate consideration to Section 2 of the Voting Rights Act when it designed a plan so as not to violate the threshold requirements for liability under Section 2 established by this Court in *Thornburg* v. *Gingles*, 478 U.S. 30 (1986)?

(3) Did the court below properly determine that, in fashioning its plan for the South Carolina Senate, it was not required to maximize minority voting strength?

(3) Assuming *arguendo* that maximization is required, did the court below, in fashioning its plan for the South Carolina Senate, create the maximum number of districts in which black voters have the potential to elect a candidate of their choice, as defined by *Thornburg* v. *Gingles*, 478 U.S. 30 (1986), and other cases interpreting Section 2 of the Voting Rights Act?

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INTRODUCTION

In this case Plaintiffs-Appellants Statewide Reapportionment Advisory Committee, *et al.* ("SRAC") and Defendant-Cross-Appellant Carroll A. Campbell, Jr., the Governor of South Carolina (collectively, "Appellants"), appeal the order of a three-judge court which issued an injunction redistricting the South Carolina Senate and House of Representatives and the State's six Congressional districts.[1] Appellants argue that the three-

[1] Because the Governor was named as a defendant below, he is a cross-appellant in this Court; however, he seeks much the same

judge court failed to give adequate consideration to the requirements of Section 2 of the Voting Rights Act of 1965, 42 U.S.C. § 1973, which prohibits voting laws that result in discrimination against blacks and other protected minority groups by denying them an equal opportunity "to participate in the political process and to elect representatives of their choice." Appellant SRAC claims further that the court consequently failed to maximize the number of black majority districts, as supposedly mandated by Section 2. Because Appellants' arguments are without merit, Appellee South Carolina Senate ("the Senate") moves that the appeal be dismissed or, in the alternative, that the judgment of the three-judge court be affirmed.

STATEMENT OF THE CASE

I. BACKGROUND AND PROCEDURAL HISTORY

South Carolina's General Assembly is composed of a House and a Senate. *Burton v. Sheheen*, No. 3:91-2983-1 (D.S.C. May 1, 1992) (to be reported at 793 F. Supp. 1329) (three-judge court), reproduced in Appendix to SRAC Jurisdictional Statement ("SRAC App.") 4. The Senate has 46 members, who are elected from single-member districts. SRAC Jurisdictional Statement ("SRAC J.S.") 12.

The Senate was last reapportioned in 1984. After a three-judge court adopted an interim redistricting plan with nine black majority districts and held that this plan satisfied Section 2, *Graham v. South Carolina*, No. 3:84-1430-15 (D.S.C. July 31, 1984) (copy lodged with this Court), the General Assembly passed a plan that created ten black majority districts. SRAC App. 5, 27 n.34. Of these ten districts, seven had a black majority voting age population ("VAP"). SRAC App. 27 n.34. The Gov-

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relief as the SRAC. Appellants do not challenge the three-judge court's proposed Congressional districts, but rather only the plans for the Senate and House. The Senate will address only those arguments relating to the three-judge court's plan for the Senate.

ernor signed the plan into law, and the United States Attorney General "precleared" it pursuant to Section 5 of the Voting Rights Act of 1965, 42 U.S.C. § 1973c.[2]

Following the 1990 census, which revealed that the districts drawn in 1984 had become substantially unequal in population, the Senate set about the task of redistricting. The Senate Judiciary Committee's seven-member Subcommittee on Redistricting and Reapportionment (which included one black member and two Republicans) held extensive public hearings, in order to obtain the views of citizens and interested groups regarding redistricting. The Subcommittee also adopted a set of neutral criteria to guide it in formulating redistricting plans. These criteria included drawing districts of equal population (the "one person, one vote" rule) and complying with the Voting Rights Act. Following the hearings, the Senate passed a redistricting plan for itself and a Congressional redistricting plan. The plans were introduced in the House, but the House was unable to act on them before the General Assembly's statutorily mandated *sine die* adjournment date of June 6, 1991. S.C. Code Ann. § 2-1-180 (Law. Co-op. 1986).

On October 4, 1991, Michael Burton, the Executive Director of the South Carolina Republican Party, brought an action challenging the continued use of the 1984 Senate districts, as well as the Congressional and House districts drawn after the 1980 census. *Burton v. Sheheen*, No. 3:91-2983-1 (D.S.C. filed Oct. 4, 1991). The complaint alleged that these districts violated the one person, one vote rule and Section 2. The complaint further

[2] Section 5 requires certain jurisdictions, including South Carolina, to obtain prior approval, known as "preclearance," of changes in laws, practices, or procedures affecting voting. *See Georgia v. United States*, 411 U.S. 526 (1973) (holding that Section 5 applies to redistricting plans). To obtain preclearance, such jurisdictions must prove either to the United States Attorney General or to a three-judge district court in the District of Columbia that the proposed change has neither a discriminatory purpose nor a discriminatory effect. 42 U.S.C. § 1973c.

alleged that the General Assembly was deadlocked on the issue of redistricting and that judicial action to implement redistricting plans was therefore necessary. The complaint sought declaratory relief, an injunction against the further use of these districts, and an order implementing Congressional and State legislative redistricting plans to be offered by plaintiffs. The Senate moved to intervene pursuant to Fed. R. Civ. P. 24, and the motion was granted on November 13, 1991.

On October 31, 1991, the SRAC brought its own redistricting suit, *Statewide Reapportionment Advisory Committee v. Campbell*, No. 3:91-3310-1 (D.S.C. filed Oct. 31, 1991), making substantially the same allegations as the *Burton* plaintiffs.[3] The two suits were consolidated for trial before a three-judge panel, consisting of Circuit Judge Clyde Hamilton, Chief District Judge Falcon Hawkins, and District Judge G. Ross Anderson, Jr., that had been appointed pursuant to 28 U.S.C. § 2284.

After the General Assembly reconvened on January 14, 1992, it moved quickly on reapportionment and passed a plan for the Senate on January 29, 1992. The Governor vetoed the plan and the veto was sustained. With respect to Congressional redistricting, the House and Senate passed separate plans. A conference committee was appointed, but was unable to reach agreement. As a consequence of the apparent impasse, the three-judge court undertook to devise its own Congressional and State legislative redistricting plans.

II. THE TRIAL

The trial commenced on February 19, 1992, and continued through March 6. At the outset, all parties stipulated that the existing Congressional and State legislative districts (*i.e.*, those adopted following the 1980

[3] While neither complaint asserted Section 5 of the Voting Rights Act as a basis for jurisdiction, the SRAC concedes that it contended below that "any plan adopted by the court must comply with Sections 2 and 5 of the Voting Rights Act." SRAC J.S. 5.

census) were malapportioned and could no longer be used. SRAC App. 3 n.2. The stipulation obviated the need for the court to reach the claim that these districts also violated Section 2 of the Voting Rights Act. SRAC App. 3 n.2. Rather, given this threshold stipulation, the court's task was to implement a plan that remedied the one person, one vote violation while complying with all other legal requirements, including the Voting Rights Act.

The court's task was a massive one, which had to be undertaken in the face of tight time constraints. Primary elections were scheduled for June 9, 1992, as required by S.C. Code Ann. § 7-13-40 (Law. Co-op. Supp. 1991), and State legislative and Congressional candidates were required by law to file notices of candidacy by March 30 and April 30, 1992, respectively, S.C. Code Ann. § 7-11-210 (Law. Co-op. Supp. 1991). To alleviate some of the time pressure, the court postponed the primary until August 25 and the filing deadlines until June 25. SRAC App. 86 n.79. Even with this delay, the court still faced a substantial task, which was made even more difficult by the fact that the parties offered nine proposed plans for Congress, five for the House, and five for the Senate.[4] During the three weeks of hearings, the court heard lay and expert testimony from numerous witnesses and received hundreds of exhibits totalling in the thousands of pages.

The SRAC advocated a plan for the Senate that its drafter freely admitted was designed to maximize numerically black representation. Senate Appendix ("Sen. App.") (attached hereto) 16a, 17a-18a, 22a. Contending that a district generally had to be 58% black in total population in order to give blacks an equal opportunity to elect candidates of their choice, Sen. App. 17a,

[4] Senate plans were offered by the SRAC, the Governor, the Senate, the Lieutenant Governor, and the *Burton* plaintiffs (on behalf of the Republican Party). SRAC J.S. 12. Because only the SRAC and the Governor have appealed, only their plans will be addressed in this brief.

the SRAC drew as many districts as possible that exceeded this percentage. The SRAC plan for the Senate contained a total of 14 black majority districts, of which 12 had a black VAP majority. *See* SRAC J.S. 12 (chart comparing the various plans for the Senate).

Like the plan ultimately drawn by the three-judge court (which is depicted at Sen. App. 41a), the SRAC plan (which is depicted at Sen. App. 42a) placed eleven black majority districts in areas with naturally occurring, compact, and contiguous black population concentrations. Unlike the court's plan, however, the SRAC plan drew three additional black majority districts by stringing together scattered pockets of minority population with no community of interest. The SRAC plan included a district in the Savannah Valley (SRAC District 10) which stretched for almost 100 miles beginning in Anderson County[5] and extending through six other counties along the Georgia border; a district winding northward from the suburbs of Columbia in the central part of the State all the way to Spartanburg County near the North Carolina border (SRAC District 15); and a district created by roping minority concentrations from Georgetown, Horry, Marion, and Williamsburg Counties in the eastern part of the State (SRAC District 34).[6]

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[5] A county map of South Carolina is included in the Appendix to the Governor's Jurisdictional Statement 43.

[6] In order to make this district an "open" one (*i.e.*, without an incumbent), the SRAC plan put two white incumbents together in an adjacent district. The drafter of the SRAC plan, Dr. John Ruoff, admitted that he would not have paired these two incumbents if they had been black. Sen. App. 39a. While conceding that whites could represent blacks and that both these incumbents represented districts with "pretty solid" black majorities, Dr. Ruoff explained that he was not seeking to protect existing black majority districts but rather to protect existing black majority districts that were electing blacks. Sen. App. 24a-25a.

The Governor advocated a plan (which is depicted at Sen. App. 43a) that contained two more black majority districts than in the three-judge court's plan (Governor's Districts 10 and 34) in roughly the same areas as SRAC Districts 10 and 34. The Governor's plan pitted ten Democratic Senators against each other. SRAC App. 65 n.61.

Appellants argued that the creation of the additional black majority districts was justified (and, in fact, required) because of allegedly extensive racial bloc voting in South Carolina.[7] At the urging of the court, the parties stipulated that "since 1984 there is evidence of racially polarized voting in South Carolina." SRAC App. 56. The SRAC and the *Burton* plaintiffs also offered expert testimony that voting in South Carolina is highly polarized along racial lines. The SRAC is wrong, however, to characterize this evidence as "unrebutted." SRAC J.S. 6. Counsel for the Senate, the Lieutenant Governor, and the South Carolina Democratic Party demonstrated through cross-examination that the evidence of racial bloc voting in the three additional districts that the SRAC and/or the Governor sought to create was simply inadequate.[8]

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[7] In *Thornburg v. Gingles*, 478 U.S. 30, 53 n.21 (1986), this Court defined racial bloc voting as a consistent relationship between the race of the voter and the way he or she votes.

[8] With respect to those districts, the *Burton* plaintiffs' expert Dr. Theodore Arrington admitted that he had analyzed only one election, the 1990 general election for Governor, in which State Senator Theo Mitchell, who is black, lost to Carroll Campbell, a highly popular white incumbent. Sen. App. 1a. As the court properly found, "the testimony regarding the strength of polarization exhibited in some races, such as the 1990 governor's race, was minimized by factors such as incumbency." SRAC App. 56. Moreover, for some reason, Dr. Arrington did not analyze the 1990 Democratic primary for Governor, in which Senator Mitchell beat a white opponent. Sen. App. 5a.

Dr. James Loewen, who testified as an expert for the SRAC, analyzed no elections after 1984. SRAC J.S. 6-7. He made no study

Even assuming that the plaintiffs had offered credible evidence of racial bloc voting (or, alternatively, that the parties' general stipulation sufficed to prove the existence of bloc voting in the particular areas under dispute), there was still substantial evidence that the additional black majority districts proposed by the SRAC and by the Governor were "illusory," in that they would not have resulted in the election of additional black Senators. Both plans sought to draw the additional districts by ignoring county lines, traditional communities of interest and naturally occurring compact areas of minority strength. Instead, they roped together diverse areas of minority population without regard to any other factor.

For example, the three-judge court found that the *Burton* plaintiffs' proposed District 10, which is highly similar to District 10 in both the SRAC and the Governor's proposed plans, "cuts into seven counties to garner black voters, and consolidates three insular and historical communities of interest." SRAC App. 63-64. The court described this district as "a particularly egregious example of the Governor's and the Republican Party's disregard for county lines and communities of interest . . . [because] the urbanites of Anderson County would be grouped with the rural communities of Abbeville County [and] the pulpwood farmers of McCormick County would

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of blacks who have been successful in winning election to the General Assembly, was unaware that certain of the districts he did analyze were now represented by blacks, and performed no analysis of any of the plans that were offered to the three-judge court. Sen. App. 13a-15a.

Dr. John Ruoff, another one of the SRAC's experts, agreed with Drs. Arrington and Loewen that racial polarization existed. Yet he performed no analysis of whether voting was polarized in the proposed Savannah Valley district. Sen. App. 35a. With regard to the proposed District 34, he did no analysis of elections in Georgetown County and further admitted that the black community in Williamsburg County was able to elect candidates of its choice despite polarized voting. Sen. App. 33a-35a, 36a. He also admitted to numerous examples of successful black candidacies in cities within the proposed district north of Columbia. Sen. App. 28a-33a.

share representation with the industrial workers of Aiken County." SRAC App. 63-64; *see also* Sen. App. 6a-7a (Testimony of Michael Couick, Director of Research and Attorney for the Senate Judiciary Committee) (District 10, as drawn by the SRAC, the Governor, and the *Burton* plaintiffs, was not an electable minority district due to a combination of factors, including a high number of split precincts, an unacceptable geographic stretch, a lack of unified communities of interest, and the lack of a core existing district).

Similarly, the district proposed by the SRAC north of Columbia (District 15) lacked a community of interest. This proposed district was created by fracturing a compact, cohesive, predominantly black area into two districts (Districts 15 and 17) and splitting precincts and adding disparate groups of black voters with no community of interest to increase the black percentage of the population. *See* Sen. App. 11a-12a.[9]

The majority black districts proposed by the SRAC and the Governor in the eastern part of the State likewise disrupted existing communities of interest and diluted black voting strength in adjacent districts. SRAC District 34 fractured Williamsburg County, a black majority county, into four separate districts, and neighboring Georgetown County, which also has significant black population, into three districts. In so doing, the SRAC split Williamsburg County's cohesive black majority, which has successfully elected numerous black officials. These significant changes to existing political boundaries in order to create an additional majority black district in District 34 also had the effect of fracturing the black population in two adjacent effective black majority districts, raising considerable doubt as to whether any of the three resulting districts would provide sufficient electoral opportunities to black voters. *See* Sen. App. 9a-11a.

[9] The Governor did not even include this district in his proposed plan.

District 34 in the Governor's plan created a black majority by borrowing black population from neighboring District 30, another black majority district. To make up for the lost population, District 30 had to pick up black voters from Dillon County. Because these voters have a low turnout, however, the Senate, with the support of the black incumbent in District 30, opposed putting them in the district, fearing that they would impair its electability. Sen. App. 10a.

In addition, the additional black majority districts in the SRAC plan and the Governor's plan contained numerous split precincts, which further impaired minority electability in these districts. Though Appellants claimed that splitting precincts was necessary to create the additional black majority districts, the three-judge court heard extensive testimony that split precincts cause enormous confusion among voters, who frequently do not know the district in which they are supposed to be voting. *E.g.*, Sen. App. 6a-7a, 23a. This confusion decreases turnout, which impacts disproportionately on minority voting strength. Sen. App. 2a-5a.

In sum, the evidence showed that, because the additional black majority districts cut through counties and other communities of interest, joined disparate areas without common geographic or social ties, and split precincts, these districts were not effective, electable black majority districts.

ARGUMENT

I. THE THREE-JUDGE COURT PROPERLY HELD THAT ITS PLANS DID NOT HAVE A DISCRIMINATORY EFFECT UNDER SECTION 5 OF THE VOTING RIGHTS ACT

The court below rejected each of the plans proffered by the parties and drew its own plans instead.[10] The three-judge court's plan for the Senate contains eleven districts with black population majorities, an increase of one over the plan passed by the General Assembly and precleared by the Department of Justice in 1984. SRAC App. 68. Ten of these districts have black VAP majorities. SRAC App. 68.

In reaching this result, the court recognized that its remedial plan must be racially fair. The court observed that, under *McDaniel v. Sanchez*, 452 U.S. 130 (1981), it was not required to obtain Section 5 preclearance for its plan. SRAC App. 25. The court also recognized, however, that, in fashioning relief, it "must be cognizant of § 5 concerns that voting changes have neither the 'purpose . . . [nor] the effect of denying or abridging the right to vote' on the basis of race." SRAC App. 25.[11]

[10] The three-judge court's plan for the Senate had a deviation of only 1.95% between the population of the largest and smallest districts. SRAC App. 61. The court rejected plans offered by the Senate and Lieutenant Governor for having too high a deviation. SRAC App. 61-62 n.58. Relying on the State's policy of preserving county boundaries in redistricting, the court rejected plans offered by the SRAC, the Governor, and the *Burton* plaintiffs for splitting more counties than necessary to comply with the one person, one vote rule. SRAC App. 61-63 & n.58. The court's rulings on the one person, one vote issues are not challenged here.

[11] Appellants contend that the court erred in stating that this case arose under Section 5. SRAC J.S. 22; Governor's Jurisdictional Statement ("Gov. J.S.") 3. As the SRAC admits, however, its position below was that "any plan adopted by the court must comply with" Section 5 (as well as Section 2). SRAC J.S. 5. More important, the issue here is not whether this case arose under Section 5 as opposed to Section 2 but rather whether the court gave suffi-

With respect to purpose, the court stated: "We take it as a given that this court, in fashioning its remedy, is not acting with a racially discriminatory purpose." SRAC App. 25. As for discriminatory effect, the court below employed the "retrogression" test of *Beer v. United States*, 425 U.S. 130 (1976), and *City of Lockhart v. United States*, 460 U.S. 125 (1983), and held that its plans did not have a discriminatory effect under Section 5 because they increased minority voting strength from what it had been under the previous redistricting plans. SRAC App. 25-31, 65-67.

Citing *Wilkes County, Ga. v. United States*, 450 F. Supp. 1171 (D.D.C.), *aff'd mem.*, 439 U.S. 999 (1978), the SRAC argues that, in deciding the retrogression issue, the three-judge court should have compared its plans to those proffered by the parties rather than to the pre-existing plans. SRAC J.S. 18 n.23. As the court observed, however, this approach conflicts with this Court's decisions in *Beer* and *City of Lockhart*. SRAC App. 30 & n.35.

In *Beer*, this Court held that the 1970 redistricting plan for the New Orleans City Council did not have a discriminatory effect under Section 5 because the plan did not diminish black voting strength. 425 U.S. at 141-42. In reaching this conclusion, the Court engaged in a simple comparison of the 1970 plan and its predecessor:

> Under the apportionment of 1961 none of the five councilmanic districts had a clear Negro majority of registered voters . . . . Under [the 1970 plan], by contrast, Negroes will constitute a majority of the population in two of the five districts and a clear majority of the registered voters in one of them. . . . It was therefore error for the District Court to conclude that [the 1970 plan] "will . . .

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cient consideration to the requirements of *both* sections in fashioning its plans. As we demonstrate, a fair reading of the court's opinion shows that it did.

> have the effect of denying or abridging the right to vote on account of race or color" within the meaning of § 5 of the Voting Rights Act.

Id. Similarly, in *City of Lockhart*, in determining whether changes to the city's charter were retrogressive, the Court compared the new system to "the practices in use in Lockhart prior to the new charter." 460 U.S. at 133. In light of these cases, the three-judge court here was clearly correct in rejecting the SRAC's claim that the appropriate comparison is between the court's redistricting plans and those proposed by the parties.[12]

II. THE THREE-JUDGE COURT GAVE MORE THAN ADEQUATE CONSIDERATION TO THE REQUIREMENTS OF SECTION 2

Both the SRAC and the Governor contend that, in drawing redistricting plans, the three-judge court failed to give adequate consideration to the requirements of Section 2 and that the decision below conflicts with the opinions of

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[12] The court below also was correct in holding that *Wilkes County* does not control the present case. In *Wilkes County*, the county sought preclearance for a change from unequally populated single-member districts to at-large elections. Though the county claimed that the change was necessary to cure the malapportionment, the court found that the county had acted with a discriminatory purpose in making the change shortly after blacks began registering to vote in substantial numbers. 450 F. Supp. at 1175-76. Applying *Beer*, the court also found that, when "compared to the use of the existing election districts," the use of at-large elections also produced a discriminatory effect under Section 5 by "reducing the influence of blacks in elections." *Id.* at 1178. Either of these findings was sufficient to deny preclearance, because Section 5 requires the absence of both discriminatory purpose and discriminatory effect. 42 U.S.C. § 1973c. Consequently, the court's additional finding that at-large elections had a discriminatory effect as compared to "options for properly apportioned single-member district plans," 450 F. Supp. at 1178, is *dicta*; and whatever its applicability may be to cases involving changes from single-member districts to at-large elections, it is not controlling in the present case, which does not involve such a change.

this Court and others. SRAC J.S. 18, 22-25; Gov. J.S. 8-13. Neither contention is correct.

The court recognized that "[i]t would be incongruous . . . to adopt a plan which did not comport with the standards and guidelines of § 2." SRAC App. 38. Consequently, the court stated that it would be "guided by the admonition in [*Thornburg v.*] *Gingles* [,478 U.S. 30 (1986),] that a determination [under Section 2] of 'whether the political processes are "equally open" depends on a searching practical evaluation of the "past and present reality."'" SRAC App. 45 (citations omitted). The court went on to state that "since it would be anomalous for this court to adopt a plan which immediately lends itself to an attack under § 2, our analysis should ensure that the threshold requirements of a § 2 action cannot be established under the adopted plan." SRAC App. 45. Accordingly, in conducting its analysis, the court considered, *inter alia*, (1) "the extent to which reasonable compact and contiguous majority black districts were and could be drawn"; (2) "the extent to which the minority group is politically cohesive"; and (3) "the extent to which racially polarized voting patterns exist." SRAC App. 46.

These three factors are taken almost verbatim from the leading Section 2 case, *Thornburg v. Gingles*, 478 U.S. 30, 50-51 (1986), in which this Court held that they were "necessary preconditions" for any challenge to multimember districts. *Id.* at 50; SRAC App. 36 n.37.[13] Although *Gingles* left open the question of whether these preconditions are applicable outside the context of multimember districts, 478 U.S. at 47 n.12, the court below, in accordance with other decisions on this issue, applied them to the single-member districts at issue here.[14] Thus, draw-

[13] The Governor is thus wrong to imply (Gov. J.S. 12 n.9) that the court below disregarded *Gingles*.

[14] SRAC App. 46; *see, e.g., Nash v. Blunt*, No. 91-0840-CV-W-2, 1992 WL 165162, at *5, *12 (W.D. Mo. July 15, 1992); *Jeffers v. Clinton*, 730 F. Supp. 196, 205 (E.D. Ark. 1989), *aff'd mem.*, 111

ing single-member districts with these preconditions in mind "insure[d] that the court's plan will not violate the threshold requirements for liability under § 2," SRAC App. 47, and (contrary to the Governor's suggestion, Gov. J.S. 12 n.9) made it unnecessary for the court to consider the other evidentiary factors identified in the legislative history of Section 2 (such as a history of racial discrimination, socio-economic disparities between blacks and whites, and success of minority candidates). *See Brewer v. Ham*, 876 F.2d 448, 451, 453 (5th Cir. 1989) (Section 2 challenge fails because plaintiffs failed to prove first *Gingles* precondition); *McNeil v. Springfield Park District*, 851 F.2d 937, 943-44, 947 (7th Cir. 1988) (same), *cert. denied*, 490 U.S. 1031 (1989).[15]

The SRAC argues that the decision of the court below conflicts with other cases holding that court-ordered plans must comply with Section 2. SRAC J.S. 24. By applying the teaching of *Gingles*, however, the three-judge court did address the Section 2 preconditions. Moreover, despite

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S. Ct. 662 (1991); *McDaniels v. Mehfoud*, 702 F. Supp. 588, 589, 592-94 (E.D. Va. 1988); *Wilson v. Eu*, 823 P.2d 545, 565 (Cal. 1992).

[15] Conducting a more detailed Section 2 analysis was not only unnecessary but also impractical in view of the time constraints the court faced. As the court noted, the absence of valid redistricting plans had already necessitated one postponement of the primaries, and the court quite properly felt that it had to implement a plan as soon as possible in order to avoid further delays and allow elections to take place in a timely fashion. SRAC App. 44. Under similar circumstances, the court in *Watkins v. Mabus*, 771 F. Supp. 789 (S.D. Miss.) (per curiam), *aff'd in part and vacated in part on other grounds*, 112 S. Ct. 412 (1991), refused altogether to consider the claims of black voters that the interim redistricting plan adopted by the court violated Section 2. *Id.* at 802-05; *see also Puerto Rican Legal Defense and Education Fund, Inc. v. Gantt*, Nos. CV-92-1521 (SJ), CV-92-1776(SJ), 1992 WL 174491 (E.D.N.Y. July 10, 1992) (denying motion to enjoin enforcement of redistricting plan alleged to violate Section 2). *See generally Upham v. Seamon*, 456 U.S. 37, 44 (1982) (per curiam).

what the Governor claims, Gov. J.S. 8-13, the analysis used by the court below is consistent with that undertaken by courts in other recent redistricting cases. For example, just as the court here sought to design a plan that "will not violate the threshold requirements for liability under § 2," SRAC App. 47, the court-appointed special masters who drew the plans in *Wilson v. Eu*, 823 P.2d 545 (Cal. 1992), sought to "avoid section 2 challenges to our new districts by eliminating the possibility of a minority group's proving any one of the three [*Gingles*] prerequisites." 823 P.2d at 565. And, like the court here, the court in *DeGrandy v. Wetherell*, No. TCA 92-40015-WS, No. 92-40131 (N.D. Fla. May 29, 1992) (to be reported at 794 F. Supp. 1076 (copy lodged with this Court)), recognized its obligation to "consider in crafting the redistricting plan the [S]ection 2 requirement of ensuring that the plan does not dilute the votes of racial or language minorities." *DeGrandy*, slip op. at 7.[16]

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[16] The cases cited by the Governor involving redistricting in Arizona, New York, Texas, and Illinois have likewise relied on the *Gingles* preconditions to guide their choice of redistricting plans. *See Arizonans for Fair Representation v. Symington*, No. CIV 92-256-PHX-SMM, slip op. at 5, 9-11 (D. Ariz. Apr. 30, 1992) (copy lodged with this Court); *Puerto Rican Legal Defense and Education Fund, Inc. v. Gantt*, Nos. CV-92-1521(SJ), CV-92-1776(SJ), 1992 WL 152982, at *12 (E.D.N.Y. June 26, 1992) (per curiam); *Terrazas v. Slagle*, 789 F. Supp. 828, 833 (W.D. Tex. 1991), *aff'd mem. sub nom. Richards v. Terrazas*, 112 S. Ct. 3019 (1992); *Hastert v. State Bd. of Elections*, 777 F. Supp. 634, 648-50 (N.D. Ill. 1991) (examining totality of circumstances, but only after determining that plaintiffs had satisfied the three *Gingles* preconditions).

While the court in *Emison v. Growe*, 782 F. Supp. 427, 435-36 (D. Minn. 1992), refused to apply such preconditions, that opinion provoked a strong dissent, and this Court has noted probable jurisdiction. 112 S. Ct. 1557 (1992). Significantly, the Solicitor General has argued that the *Emison* court erred by failing to apply the *Gingles* preconditions. Brief for the United States as Amicus Curiae at 8-16, *Growe v. Emison*, No. 91-1420 (U.S. May 29, 1992). In the remaining cases cited by the Governor, the parties either did not raise Section 2 issues or entered into stipulations that obviated the need to consider Section 2.

In short, though the court concluded that a plenary Section 2 review was unwarranted, SRAC App. 44, the court did not reject the applicability of Section 2. To the contrary, consistent with both *Gingles* and lower court decisions, the court analyzed the plans it drew and those proposed by the parties "with the goal of providing minorities with an equal opportunity to elect the representatives of their choice in mind." SRAC App. 46. This is exactly what Section 2 requires. 42 U.S.C. § 1973(b) (Section 2 is violated when members of a protected minority group "have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice").[17]

III. THE THREE-JUDGE COURT PROPERLY DETERMINED THAT, IN DRAWING REDISTRICTING PLANS, IT WAS NOT REQUIRED TO MAXIMIZE MINORITY VOTING STRENGTH

The SRAC's primary argument is that, as construed in *Gingles*, Section 2 required the three-judge court to maximize black voting strength. In the SRAC's view, *Gingles* holds that Section 2 is violated whenever an alternative plan exists that creates more black majority districts than the plan adopted (or drawn) by the court and there is evidence of legally significant racial bloc voting. SRAC J.S. 20; *see also* Gov. J.S. 18-19. The SRAC thus unabashedly argues that *Gingles* requires drawing the maximum possible number of black majority districts whenever such polarized voting patterns exist.

The problem for the SRAC, of course, is that neither the language of Section 2 nor the holding of *Gingles* requires any such thing. Section 2 itself says nothing that would mandate maximization of minority voting strength. By its terms, the statute guarantees protected minorities

[17] Because the court below did in fact give more than adequate consideration to the requirements of Section 2, this Court need not reach the Governor's argument that the court erred by failing to incorporate Section 2 standards into its Section 5 analysis. Gov. J.S. 14-18.

only an equal "opportunity . . . to elect representatives of their choice," 42 U.S.C. § 1973(b), not a maximum number of districts with black majorities.[18] Section 2(b)'s express disclaimer of any right to proportional representation (a system designed to maximize the electoral power of minority voters) further undercuts the SRAC's argument. Indeed, had the court below adopted the SRAC plan, it would have run afoul of the disclaimer, because that plan created 13 allegedly "electable" black majority districts out of a total of 46 (28.2%), Sen. App. 40a, in a State that has a black VAP of 26.9%, SRAC J.S. 5.

Similarly, nothing in *Gingles* requires maximization. *Gingles* holds merely that the ability to create compact black majority districts, minority political cohesiveness, and white bloc voting are "necessary preconditions" to a successful Section 2 claim. 478 U.S. at 50-51. The opinion does not, however, hold that these preconditions are themselves sufficient to establish a Section 2 claim.[19] Nor does

[18] The relevant language of Section 2 is taken directly from this Court's decision in *White v. Regester*, 412 U.S. 755, 766 (1973), and the legislative history makes clear that the 1982 amendment to Section 2 "codifies the holding in *White*, thus making clear the legislative intent to incorporate that precedent and [the] extensive case law which developed around it, into the application of Section 2." S. Rep. No. 417, 97th Cong., 2d Sess. 32 (1982), *reprinted in* 1982 U.S. Code Cong. & Admin. News 177, 210. Significantly, the cases construing *White* unanimously rejected maximization. *See, e.g., United States v. Board of Supervisors*, 571 F.2d 951, 955 (5th Cir. 1978); *David v. Garrison*, 553 F.2d 923, 927, 930-31 (5th Cir. 1977); *Panior v. Iberville Parish School Bd.*, 536 F.2d 101, 104 (5th Cir. 1976); *Nevett v. Sides*, 533 F.2d 1361, 1365 (5th Cir. 1976), *cert. denied*, 446 U.S. 951 (1980); *see also Voting Rights Act Vol. 1: Hearings Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary*, 97th Cong., 2d Sess. ("Senate Hearings") 1204-09, 1216-26 (1982) (prepared statement of Frank Parker, Director, Voting Rights Project, Lawyers' Committee for Civil Rights under Law) (discussing the cases cited above and others applying *White*).

[19] These preconditions concern the ability of protected minorities "to elect representatives of their choice." *Gingles*, 478 U.S. at 50. A violation of Section 2, however, requires not only an unequal

Gingles hold that any plan that fails to create the maximum possible number of black majority districts violates Section 2 if racial bloc voting reaches legally significant levels.

No doubt realizing as much, the SRAC relies on Justice O'Connor's opinion concurring in the judgment in *Gingles*. That opinion, however, actually disagreed with the majority's analysis and explicitly stated that the majority "does not acknowledge . . . expressly" that its holding "results in the creation of a right to a form of proportional representation in favor of all geographically and politically cohesive minority groups that are large enough to constitute majorities if concentrated within one or more single-member districts." 478 U.S. at 85 (O'Connor, J., concurring in the judgment). Under these circumstances, Justice O'Connor's opinion can hardly be said to support a right to a plan that maximizes minority voting strength.

The error in the SRAC's position is further demonstrated by the consistent views of lower federal courts that neither Section 2 nor *Gingles* requires the creation of the largest possible number of black majority seats in State or local governing bodies.[20] The Solicitor General has like-

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opportunity to elect such representatives but also an unequal opportunity "to participate in the political process." 42 U.S.C. § 1973(b). *See Chisom v. Roemer*, 111 S. Ct. 2354, 2365 (1991) (all Section 2 claims must allege "an abridgement of the opportunity to participate in the political process *and* to elect representatives of one's choice") (emphasis in original). Thus, demonstrating the existence of the preconditions, without more, would not establish a violation of Section 2. The failure to prove the preconditions, however, obviates the need for any further inquiry under the statute. *See* Argument II, *supra*.

[20] *See Nash*, 1992 WL 165162, at *5-*6 ("We reject [the maximization] argument for a variety of reasons, foremost of which is the lack of any language in the Act to support this position"); *Quilter v. Voinovich*, No. 5:91CV-2219, 1992 WL 114718, at *5 (N.D. Ohio Jan. 31, 1992) ("We conclude that nothing in § 2 of the Voting Rights Act, *Gingles*, *supra*, or *Armour [v. Ohio*, 775 F. Supp. 1044 (N.D. Ohio 1991),] mandates the drawing of majority-minority

wise stated that "[n]othing in the Voting Rights Act requires state or local jurisdictions to maximize the number of majority-minority districts . . . ." Brief for the United States as Amicus Curiae Supporting Appellants at 12, *Voinovich v. Quilter*, No. 91-1618 (U.S. filed July 31, 1992). Thus, contrary to the SRAC's claims, the three-judge court's opinion does not contravene the language of Section 2 or this Court's decision in *Gingles*.

Moreover, the three-judge court's opinion is consistent with the legislative history of Section 2. Although the SRAC contends that the legislative history approved the use of black majority districts as a remedy for minority vote dilution, SRAC J.S. 21-22, the issue here is not whether such districts are an appropriate Section 2 remedy. The issue is whether the three-judge court was obliged to draw the maximum possible number of black majority districts. Nothing in the legislative history supports such a requirement. Indeed, when the SRAC's counsel testified before Congress in support of the bill that eventually became Section 2, he expressly stated, in an effort to rebut the claims of opponents of the bill, that it was "erroneous[]" to describe amended Section 2 as involving a "requirement of 'maximization' of minority political strength." Senate Hearings, *supra* note 18, at 386-87 (prepared statement of Laughlin McDonald). In short, the legislative history provides no more support for the SRAC's arguments than the statutory language or the case law.

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districts wherever there is a concentration of Black voters"); *Turner v. Arkansas*, 784 F. Supp. 553, 573 (E.D. Ark. 1991) (Section 2 "is not violated by a state legislature simply because that legislature does not enact a districting plan that maximizes black political power or influence"), *aff'd mem.*, 112 S. Ct. 2296 (1992); *Watkins v. Mabus*, 771 F. Supp. at 805-06 (dictum) ("It is doubtful whether *Gingles* held, as plaintiffs suggest, that the amended Voting Rights Act § 2 requires that states go beyond the requirement of non-discrimination in order to create as many non-white majority districts as possible.").

IV. ASSUMING *ARGUENDO* THAT MAXIMIZATION IS REQUIRED, THE THREE-JUDGE COURT SHOULD STILL BE AFFIRMED BECAUSE IT CREATED THE MAXIMUM NUMBER OF TRULY ELECTABLE DISTRICTS

Even if Section 2 required drawing the maximum number of majority black districts (which it does not), the three-judge court's decision should still be affirmed because its plan contains the maximum number of districts that meet Section 2's criteria. Under Section 2, "[u]nless minority voters possess the *potential* to elect representatives in the absence of the challenged structure or practice, they cannot claim to have been injured by that structure or practice." *Gingles*, 478 U.S. at 50 n.17 (emphasis in original). Thus, unless Appellants can show that they had the potential to elect candidates of their choice in the additional districts that they contend the court should have drawn, they cannot prevail.

Whether a particular plan provides minority voters the requisite potential to elect their chosen candidates is peculiarly dependent on the facts of each case, and making this determination requires an "intensely local appraisal of the design and impact" of the plan. *White v. Regester*, 412 U.S. 755, 769 (1973); *see Gingles*, 478 U.S. at 79; *Rogers v. Lodge*, 458 U.S. 613, 622 (1982). Appellate courts review the trial court's determinations using a "clearly-erroneous" standard and give deference to the local judges who heard the evidence. *Gingles*, 478 U.S. at 79.[21] The court below did not err when it declined to draw the three additional majority black Senate districts advocated by the SRAC and the two additional majority black Senate districts advocated by the Governor, because the evidence showed that these districts were not truly electable.

Under the *Gingles* preconditions discussed in Argument II, *supra*, to make out a Section 2 claim, minority voters

[21] This standard applies both to findings regarding the *Gingles* preconditions and to the ultimate finding of vote dilution. *Gingles*, 478 U.S. at 79.

must show, *inter alia*, that their group is "sufficiently large and geographically compact to constitute a majority in a single-member district." *Gingles*, 478 U.S. at 50. Otherwise, they cannot prove that the challenged districting plan impairs their ability to elect candidates of their choice. *Id.* Though the SRAC claims that a district must have at least 57% black total population to be electable, SRAC J.S. 8, this approach is inconsistent with the case law, which has recognized that the concentration of black voters required to satisfy Section 2 will vary from district to district depending upon the circumstances.[22] Appellants' approach is also inconsistent with the evidence, which showed that black candidates have been elected in districts that were less than 57% black and white candidates have been elected in districts that exceeded this figure.[23] In short, whether a district can elect a black candidate depends not just on percentages but also on the presence of an incumbent in the district, the district's compactness, and other factors.

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[22] *See, e.g., Puerto Rican Legal Defense and Education Fund, Inc. v. Gantt*, 1992 WL 152982, at *7 ("the Supreme Court has declined to adopt bright-line formulae for determining whether the VAP percentage of a minority group in a district is so low that a court should suspect dilution of minority voting strength"); *Nash*, 1992 WL 165162, at *10 ("The precise number [of minority voters required for an effective minority district] is a question of fact that may differ depending upon the circumstances."); *Ewing v. Monroe County, Miss.*, 740 F. Supp. 417, 426 (N.D. Miss. 1990) (noting that range of 51-55% black VAP sufficient due to prior minority candidates' success in districts with less than 50% black VAP).

[23] Since 1984, Senator Theo Mitchell, who is black, has been continuously elected from Senate District 7 with a total black population of 50.23% and a black VAP of 45.31%. *See* SRAC App. 68. McKinley Washington, who is also black, was elected in Senate District 45, which is only 54.6% black in total population. Sen. App. 18a-20a. By contrast, Yancey McGill and John Land, both of whom are white, represent Senate District 32, which is 58.15% black, and Senate District 36, which is 63.24% black, respectively. Sen. App. 24a.

Appellants claim that the three-judge court ignored these factors and simply held that any district with more than 50% black VAP was sufficient to provide black voters with the opportunities required under Section 2. SRAC J.S. 25; Gov. J.S. 20-21. In fact, the three-judge court expressly noted that "beyond the use of voting age population, we have considered other factors, such as the presence of an incumbent in a district, in formulating our plans." SRAC App. 49. The court explained that, in a district with a black incumbent, "black voter turnout will be greater than if there is no incumbent running, which will, in turn be greater than if a white incumbent were running." SRAC App. 50.

The SRAC also complains that the three-judge court "refused to consider . . . extensive evidence of racial bloc voting," evidence that the SRAC claims showed that a district with a 50.1% black VAP would not satisfy Section 2. SRAC J.S. 25. To the contrary, the three-judge court did consider the expert testimony offered by plaintiffs and concluded that "the extent to which voting is polarized in South Carolina remains an open question and will certainly vary from locality to locality." SRAC App. 56. In view of *Gingles*' requirement that evidence of racially polarized voting must be district-specific, 478 U.S. at 59 n.28, and the deficiencies in the expert testimony, *see supra* p. 7 and note 8, the court's finding was unquestionably correct. The court nonetheless accepted the parties' stipulation that "since 1984 there is evidence of racially polarized voting in South Carolina." SRAC App. 56. The three-judge court's decision not to draw all of the majority black Senate districts advocated by Appellants was not based on a lack of evidence of racial bloc voting, but rather on evidence demonstrating that the proposed districts were not sufficiently compact, as required by *Gingles*, 478 U.S. at 50.

In determining whether a district is compact under *Gingles*, courts take a "functional" approach, rather than

relying on the shapes of the districts.[24] Under a functional approach, "a district is sufficiently geographically compact if it allows for effective representation," *Dillard v. Baldwin County Bd. of Educ.*, 686 F. Supp. 1459, 1466 (M.D. Ala. 1988), *i.e.*, if the citizens within the district are able "to relate to each other and their representatives" and the representatives are able "to relate effectively to their constituency." *Wilson*, 823 P.2d at 574. In addition, "the functional aspect of geographical compactness takes into account the presence or absence of a sense of community made possible by open lines of access and communication." *Id.* at 549. "If a district is so spread out that no sense of community exists, then that district is not sufficiently compact." *DeGrandy*, slip op. at 18.[25]

In keeping with the functional approach to compactness, the three-judge court recognized that "the color of

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[24] *See generally DeGrandy v. Wetherell*, No. TCA 92-40015-WS, No. 92-40131, slip op. at 8 ("[T]he proper focus of any geographic compactness analysis is upon the size and relative concentration of the minority population, rather than upon the size or shape of the district."); *Dillard v. Baldwin County Bd. of Educ.*, 686 F. Supp. 1459, 1465-66 (M.D. Ala. 1988) ("By compactness, [*Gingles*] does not mean that a proposed district must meet . . . some aesthetic absolute, such as symmetry or attractiveness."); *Wilson*, 823 P.2d at 574 ("Compactness does not refer to geometric shapes . . . ."). The functional approach to compactness is consistent with both the legislative history of Section 2 and Justice Brennan's opinion in *Gingles*. 478 U.S. at 48 n.15.

[25] The compactness requirement becomes more important in the case of single-member districts than in the case of multi-member districts or at-large elections. The reason is that, when plaintiffs challenging a multi-member district ask the court to divide it into single-member districts, the proposed districts by definition will always be smaller in area and therefore no less compact than the multi-member districts they replace. By contrast, when plaintiffs challenge a single-member districting plan and ask the court to draw different single-member districts, there is no similar limitation. The proposed districts may stretch all over the State and therefore may be substantially less compact than the districts they replace. In such a situation, the court must take particular care to observe *Gingles*' compactness requirement.

one's skin, in and of itself, does not create a community of interest. Rather, a community's views on crime, employment, education, police brutality, urban sprawl, or urban blight may be just as indicative of a community of interest as whether the members of the community are predominantly black or white . . . ." SRAC App. 54-55 (footnote omitted); *see Wilson*, 823 P.2d at 574-75 (functional compactness "speaks to relationships that are facilitated by shared interests"); *see also* Sen. App. 8a (Senate criteria for drawing districts meant to promote "districts where the people that are in the district will have . . . a collective sense [that] they're a district and they know the issues that are going on that affect that district").

Appellants apparently believe that, so long as it is physically possible to draw a district that is at least 57% black, Section 2 requires that district to be included in any court-drawn plan, regardless of whether it is functionally compact. Such an approach runs directly contrary to the geographical compactness mandate of *Gingles*. 478 U.S. at 50. As the court observed in *Watkins v. Mabus*, 771 F. Supp. at 805, "*Gingles* does not interpret § 2 of the Voting Rights Act to require the creation of majority non-white districts that are not geographically compact." *See also Wilson*, 823 P.2d at 566 ("[S]ection 2 need not control formulation of plans where minority voters are not, functionally, geographically compact").

Contrary to the SRAC's claim that its evidence of compactness was "conceded by the parties and the court," SRAC J.S. 6 n.6, the evidence demonstrated that the additional districts advocated by the SRAC and the Governor did not meet *Gingles*' compactness requirement. As discussed above, the Savannah Valley district (District 10) strung together disparate communities of interest in seven different counties. *See supra* pp. 8-9. The district proposed by the SRAC north of Columbia (District 15) fractured a compact predominantly black area into two dis-

tricts (Districts 15 and 17) and, by splitting precincts, added disparate groups of black voters with no community of interest to increase the black percentage of the population in both districts. *See supra* p. 9. The majority black districts proposed by the SRAC and the Governor in eastern South Carolina likewise disrupted existing communities of interest and diluted black voting strength in adjacent districts. *See supra* pp. 9-10.

Appellants complain that, in determining not to draw additional majority black districts, the three-judge court improperly deferred to "the state policy of recognizing county lines." SRAC J.S. 28; Gov. J.S. 22-25.[26] Contrary to Appellants' claims that the preservation of county lines somehow runs counter to the policies underlying Section 2, courts have held the preservation of political boundaries, such as county lines, promotes the creation of districts encompassing communities of interest in conformity with the compactness requirement of *Gingles*. As the special masters who drew reapportionment plans for the California Supreme Court explained, preservation of the "geographical integrity of any city, county, or city and county" when drawing legislative districts (as required by that State's Constitution) is entirely compatible with Section 2.

> [U]se of [the California constitutional] criteria reinforces the [Voting Rights] Act's guarantee to minority groups to have an equal opportunity "to participate in the political process." . . . [P]olitical effectiveness can be enhanced by membership and

[26] Appellants' argument cannot be that the three-judge court refused altogether to break county lines in order to enhance minority voting strength, as the court did precisely that in fashioning a majority black Congressional district. SRAC App. 84 & n.78. What Appellants are really contending is that the court should have crossed even more county lines in order to create additional black majority districts in the Senate and the House. This is, essentially, a rehashing of Appellants' maximization argument and should be rejected as such. *See* Argument III, *supra*.

> participation in community affairs: candidates for public office can be recruited and nurtured, local media may be better utilized . . . [and] grassroots organizing and campaigning are more viable.

Wilson, 823 P.2d at 574-75 (citation omitted).[27] Here, by minimizing cuts across county lines, the three-judge court's plan for the Senate served both state policy and the requirement of "racial fairness." SRAC App. 70.[28]

The SRAC's argument that the three-judge court "chose to honor 'South Carolina's traditional and legitimate policies' of protecting incumbents," SRAC J.S. 28, rather than apply the principles embodied in Section 2, is equally

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[27] *See Arizonans for Fair Representation v. Symington*, No. CIV 92-256-PHX-SMM, slip op. at 11-12, 15; *Magnolia Bar Ass'n, Inc. v. Lee*, No. J90-0413(B), slip op. at 29-30 (S.D. Miss. July 15, 1992) (to be reported at 793 F. Supp. 1386) (copy lodged with this Court); *see also Connor v. Finch*, 431 U.S. 407, 430 (1977) (Blackmun, J., concurring) (noting in the context of a challenge on racial fairness grounds to a court-ordered redistricting plan that "[w]here there is an established policy of respecting political or natural boundaries in districting, then I believe that a court may best avoid any appearance of partisanship by using those boundaries as much as possible in its districting"). *Cf. Good v. Austin*, No. 91-CV-74754DT, 1992 WL 173862, at *5 (E.D. & W.D. Mich. July 28, 1992); *Prosser v. Elections Bd.*, 793 F. Supp. 859, 866 (W.D. Wis. 1992); *Wesch v. Hunt*, 785 F. Supp. 1491, 1498 (S.D. Ala.), *aff'd mem. sub nom. Camp v. Wesch*, 112 S. Ct. 1926 (1992); *Carstens v. Lamm*, 543 F. Supp. 68, 88 (D. Colo. 1982) ("[P]olitical subdivisions should remain undivided whenever possible because the sense of community derived from established governmental units tends to foster effective representation.").

[28] The three-judge court also noted that its plan minimized the number of split precinct lines. While recognizing that this was "primarily an issue which effects administrative convenience, splitting precincts also has the effect of confusing both voters and potential voters; thus, in some instances, serving to abridge the right to vote or to have their vote counted." SRAC App. 64. Each of the additional majority black districts proposed by the SRAC and the Governor contained split precincts, and the testimony at trial showed that such splits adversely affect black turnout, *see* Sen. App. 2a-5a, thus reducing the "electability" of these districts.

unavailing. In fact, the three-judge court expressly stated that "[a]lthough protecting constituent-representative relations may be a legitimate concern for a legislative body fashioning a plan, this court must act circumspectly and without taint of arbitrariness." SRAC App. 64 (citations omitted). Accordingly, the three-judge court's apolitical treatment of the incumbency issue was entirely proper.[29]

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[29] For example, the court looked at the extent to which the placement of more than one incumbent in a given district indicated "apparent partisan considerations." SRAC App. 65; *id.* at 65 n.61 (criticizing Governor's plan for Senate because it paired ten Democratic incumbents); *see Prosser*, 793 F. Supp. at 871 (noting that court-drawn plan was less partisan than plans submitted by parties because it pitted the least number of incumbents against each other). The court also considered incumbency to determine what impact the race of the incumbent would have on "the effectiveness of the black voting age population." SRAC App. 49-50. The court observed that, to satisfy Section 2, a smaller percentage of black voters was required in a district with a black incumbent than in an open district or one with a white incumbent. SRAC App. 49-50; *see Nash*, 1992 WL 165162, at *10 (noting that determining the requisite minority population size is a multi-factor inquiry).

CONCLUSION

For the reasons set forth above, the appeal and the cross-appeal should be dismissed or, in the alternative, the judgment of the three-judge court should be affirmed.

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Respectfully submitted,

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